Supreme Court, U.S.
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No. 061065

In the
Supreme Court of the United States

BERLE E. GABBARD,
Petitioner,

v.

FIRST TENNESSEE BANK, and CITY OF KNOXVILLE; JOHN DOES (Six Unkown Officers of the Knoxville City Police Department); UNIVERSITY OF TENNESSEE MEDICAL CENTER (Psychological Division); JANE DOE (An Employee of the U.T. Medical Center's Psychological Division),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER, CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE DEPARTED FROM THE WELL-FOUNDED JURISPRUDENCE OF THEU.S. SUPREME COURT, ADOPTED AND APPLIED BY THE SIXTH CIRCUIT AND OTHER FEDERAL CIRCUITS, TO CREATE A SIGNIFICANTLY HIGHER STANDARD OF PROOF THAT A PRIVATE PARTY ACTING IN CONCERT WITH STATE OFFICIALS IS ACTING UNDER COLOR OF LAW?

II

WHETHER, CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE ARBITRARILY DETERMINED THAT, DESPITE THE RESPONDENT BANK'S PRECISE URGINGS THAT POLICE UNLAWFULLY DETAIN AND SUBJECT THE PETITIONER TO UNWANTED PSYCHOLOGICAL AND PHARMACOLOGICAL EVALUATION, THE RESULTING FORCED DETENTION AND EVALUATIONS DID NOT CAST THE RESPONDENT BANK'S ACTIONS UNDER COLOR OF LAW?

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DECISIONS BELOW

A copy of the U.S. Sixth Circuit Court's Order of October 30, 2006, affirming the dismissal as to the Respondent Bank is attached at Appendix A; the March 31, 2006 Final Judgment Order of Hon. Thomas W. Phillips, U.S. District Judge, Eastern District of Tennessee, Knoxville Division, denying and dismissing with prejudice Petitioner's motions: (1) for new trial; (2) for leave to amend Complaint, and dismissing the Complaint as to the Respondent First Tennessee Bank (Civil Action No. 3:05-CV-114), is attached at Appendix B.

JURISDICTION

The Order of the U.S. Sixth Circuit Court of Appeals, affirming dismissal of the Respondent Bank was entered October 30, 2006, and the mandate issued November 21, 2006. Petitioner's petition for rehearing and/or rehearing en banc was dismissed on November 22, 2006 as having been submitted untimely, and Petitioner's subsequent motion challenging the calculation of time was turned away by the Chief Deputy Clerk on December 6, 2006. Jurisdiction for the petition for writ of certiorari is conferred pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments IV, V and XIV of the Constitution of the United States, guaranteeing, respectively, security from unreasonable searches and seizures; no deprivation of life, liberty or property without due process of law; no State deprivation of life, liberty or property without due process nor any denial of equal protections of the laws:

'ENDMENT IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....

AMENDMENT V

> No person shall be...deprived of life, liberty, or property, without due process of law....

AMENDMENT XIV, §1

> No State shall...deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

This case also involves Article 1, Section 8 of the Tennessee Constitution, guaranteeing that no man be deprived of life, liberty or property, except by judgment of his peers or the law of the land:

ARTICLE 1, §8:

> ...no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

The provisions of Amendments IV, V and XIV are enforced, in pertinent part, by 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding....

STATEMENT OF THE CASE

On or about July 16, 2004, the Petitioner, a Knoxville businessman, entered the First Tennessee Bank (the Bank). Intent upon securing several thousand dollars in cash, the Petitioner presented his First Tennessee "First Resource" business card to Ms. Linda Boyd, an officer of the Bank through whom the Petitioner had transacted much of his business over the years.

Upon being told that the Bank could not comply with his request, the Petitioner stated that there was nothing wrong with the card, explaining that he had paid $50.00 to extend the life of his previous card from its 2003 expiration date to the 2006 expiration date of the card in question.[1]

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[1] The card was perfectly valid and on July 24, 2004, the Petitioner would receive $10,000.00 on the card from the Cumberland Valley National Bank, in Corbin, Kentucky. Moreover, the Petitioner was later informed that the error had been in the Bank's computer.

Ms. Boyd went to check the card again, and the Petitioner, knowing that he had other valid credit cards in a small canvas bag, stepped out to his car to retrieve the bag. Upon returning inside the Bank, the Petitioner was searching through the bag when at least two officers of the Knoxville Police Department arrived, supported by an ambulance and its crew.

The police and ambulance had been summoned by Bank officials who, although not directly involved with the Petitioner's transaction, had, apparently, grossly misjudged that the Petitioner was deranged or a substance abuser and had urged police officials and/or City of Knoxville officials that the Petitioner be detained and subjected to psychological and/or pharmacological evaluation.

The Petitioner quickly explained that he was searching through his business and credit cards, but the younger of the two officers continued to approach in a manner indicating an intent to restrain the Petitioner.

The Petitioner stated to the officers that he was trying to protect their jobs and pointed out that there was absolutely no reason to take him into custody. Those remarks seemed to register with the older of the two officers who called off the younger officer, saying to him "he's right."

Momentarily uncertain about how to resolve the matter, the police officers were urged by the Bank to detain the Petitioner for substance testing or other evaluation, and soon both the police officers and the Bank officials were expressing the unified conviction that the Petitioner should be detained.

The Petitioner voiced his objection for the record. However, the Petitioner realized that, at the urgings of the

Bank, the debate had shifted against him and fearing that the police were about to arrest him, the Petitioner stated that he would go to a medical facility to establish that he was not abusing drugs or alcohol.

The ambulance and its crew had arrived on the scene immediately with and in support of the two police officers, and after turning over certain of his personal properties to the older officer for safe keeping, the Petitioner walked aboard the waiting ambulance.

Although no formal complaint was ever filed and the Petitioner was never arrested, read his Miranda rights, hand-cuffed nor restrained by the two police officers or the ambulance personnel, the Petitioner had nonetheless been under de facto detention from the moment the police confronted him, and the Petitioner was never told that he was free to leave.

The Bank never urged the police to escort the Petitioner off the Bank's property nor accused him of any specific violation. Although, in the absence of discovery, conversations between the Bank and other Defendants remain unclear, the Bank had strenuously urged that the Petitioner be detained and subjected to pharmacological and/or psychological testing.

Once inside the ambulance, the Petitioner was driven directly to the Psychological Department of the University of Tennessee Medical Center where the Defendant John Does, Six Unknown Officers of the Knoxville Police Department, were waiting when the Petitioner emerged from the ambulance.

The Defendant Police Officers crowded around the Petitioner, physically restricting his movement, and as he walked directly to the nearest men's rest room, the Defendant Police Officers closed in to block the door.

As the Petitioner stood before a urinal relieving his bladder, a young, female employee (Jane Doe) of the Defendant University of Tennessee Medical Center (Psychological Division) entered the rest room and, slipping up behind the Petitioner with a cup in one hand, thrust her arm between the Petitioner's legs in an effort to secure a urine sample.

With the Defendant Six Unknown Police Officers crowding around to block and control his movement, the Petitioner was then herded to an area where Defendant Jane Doe and other staff persons of the Defendant Hospital's Psychological Department announced their intention to perform unspecified tests on the Petitioner.

The Petitioner thereupon stated "I don't want any tests" and asked "Do I still have to do it?" When the Defendant Hospital's staff and the Defendant Police Officers answered "yeah," the Petitioner again stated, "Make it a matter of record that I refuse this. Do I still have to do this?"

When again the answer was "yeah," the Petitioner, unwilling to risk physical injury in a futile struggle, opened his arms in a gesture of resignation and surrender.

The Petitioner was thereupon strapped down to a hospital bed with both arms tightly secured and injected with unknown drugs that rendered the Petitioner unconscious.

Without a formal complaint, arrest, warrant of arrest, court order, consent by the Petitioner or any relative, the Defendants committed the Petitioner to The Defendant Hospital's Psychological Department, solely upon the urgings of the Bank.

Lacking knowledge of the Petitioner's state of health and/or his tolerance or lack of tolerance for specific drugs, substances and treatments, The Defendant Hospital's Psychological Department subjected the plaintiff to some seven (7) days of experimental treatment, using unknown drugs and unspecified tests against the Petitioner's expressed will.

Throughout the seven days of his forced detention, the Petitioner was isolated in an intensive-care section of the Psychological Ward and kept under 24-hour surveillance.

During the first day of detention, the Defendant Hospital apparently performed a spinal tap, drawing spinal fluid from the Petitioner, and in addition to the catheter invading the Petitioner's bladder, unknown drugs were being administered, not only by IV, but via needles inserted directly into the Petitioner's belly and stomach.

Upon awakening, the Petitioner had little or no awareness of himself, his location and his condition for some two or three days, but when Petitioner's awareness returned, he discovered that his feet and legs were grotesquely swollen. That swelling persisted for several months and continues to recur to this very day.

Stripped of his Constitutional rights and deprived of all access to the courts of the United States and the State of Tennessee, the Petitioner had no way of knowing when, if

ever, the Defendants would release him and was forced to conceal the horrible swelling that had bloated his legs and feet to almost twice their size.

Feigning that he was much improved and that he had never felt better in his life, the Petitioner was discharged from the Defendant Hospital on July 23, 2004. Shortly after his discharge, the Petitioner passed out and was unconscious for some seven hours. Blackouts, episodes of temporary blindness, back pains, severe weakness, symptoms closely mimicking muscular dystrophy, severe pain in the lower legs and feet, as well as lingering humiliation, anger and fear have persisted.

On or about March 2, 2005, the Petitioner filed his civil Complaint before the United States District Court, Eastern District of Tennessee, Knoxville Division. Appendix H.

On or about March 22, 2005, the Respondent Bank filed its Motion to Dismiss for Failure to State a Claim with Memorandum. The Petitioner received no service of the Respondent Bank's motion, and on or about May 3, 2005, the U.S. District Court below entered its Order to Show Cause why the action should not be dismissed as against the Bank owing to failure of the Petitioner to prosecute the action.

On or about May 16, 2005, the Petitioner filed his Response to Order to Show Cause with Memorandum and Affidavit. On or about November 4, 2005, the U.S. District Court entered its Memorandum Opinion and Order dismissing the action as to the Respondent Bank. Appendix C.

On or about November 14, 2005, the Petitioner filed a Motion for New Trial (as to the Respondent Bank) with Memorandum. and moved for leave to Amend the Complaint.

On or about November 16, 2005, the Respondent Bank tendered its Response and Motion for Entry of Judgment with Memorandum. On or about November 28, 2005, the Petitioner tendered his Response Memorandum to the Defendant Bank's Motion for Entry of Judgment.

On or about March 31, 2006, the U.S. District Court entered a Memorandum and Order and a Final Judgment Order in which the Court Denied the Petitioner's motions to reconsider and to amend the Complaint, Granted the Respondent Bank's motion for entry of a judgment order and Entered the Final Judgment Order dismissing the Respondent Bank from this action. Appendix B.

On or about April 7, 2006, the Petitioner filed his Notice of Appeal. Appendix D.

On or about October 30, 2006, the Sixth Circuit Court of Appeals Affirmed the Final Judgment Order of the U.S. District Court. Appendix A.

The Petitioner thereupon tendered to the Sixth Circuit Court a petition for rehearing and/or rehearing en banc. On November 21, 2006, however, the Mandate of the Sixth Circuit Court issued. Appendix E.

On November 22, the day following the issuance of the Mandate, the Clerk of the Sixth Circuit Court apprised the Petitioner that his petition for rehearing, etc., had been received on November 16, 2006 and that said petition had been untimely under F.R.A.P., Rule 40(a)(1). Appendix F.

The Petitioner, arguing that his petition was timely under the time computation set forth in F.R.A.P., Rule 26(c),

thereupon moved the Court for relief from its Mandate and from failure to file the Petition.

On December 6, 2006, the Clerk of the Sixth Circuit Court apprised the Petitioner that his only recourse is to proceed to the U.S. Supreme Court on a petition for writ of certiorari. Appendix G.

ARGUMENTS IN SUPPORT OF GRANTING CERTIORARI

I. CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE DEPARTED FROM THE WELL-FOUNDED JURISPRUDENCE ESTABLISHED BY THE U.S. SUPREME COURT, ADOPTED AND APPLIED BY THE SIXTH CIRCUIT AND OTHER FEDERAL CIRCUITS, TO CREATE A SIGNIFICANTLY HIGHER STANDARD OF PROOF THAT A PRIVATE PARTY ACTING IN CONCERT WITH STATE OFFICIALS IS ACTING UNDER COLOR OF LAW

Behind the cover of its **not-recommended-for-full-text-publication** Opinion, the judicial panel of the Sixth Circuit Court, although citing Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), has obliquely challenged and negated the well-settled holdings set forth in Adickes that:

> The involvement of a policeman, a state official, whether or not his actions were lawful or authorized, in the alleged conspiracy would provide the state action needed to show a direct violation of petitioner's

> Fourteenth Amendment rights entitling her to relief under 1983, and private persons involved in such a conspiracy are acting "under color" of law and can be liable under 1983. Pp. 150 - 152. (Emphasis added).

In Adickes, employees of the H. S. Kress Company allegedly acted under color of law with Hattiesburg Mississippi police officers to deny service to Adickes (a White teacher who entered the diner with six (6) Black students). As alleged, Kress employees combined with the police to deny service to Ms. Adickes and to effect her arrest once she left the restaurant.

Unlike the facts of the instant case, there was no direct evidence in Adickes of any communications between any Kress employee and the police. Indeed, Kress produced affidavits from the chief of police and two (2) arresting officers that the store manager (Powell) had not requested that Ms. Adickes be arrested. Kress also relied on Adickes's own admissions (in her deposition) that she had no knowledge of any communications between Kress employees and the police and that she was relying solely on circumstantial evidence.

In the instant case the evidence is clear and undisputed that the Respondent Bank communicated with the police and/or other Defendants; that the Respondent Bank made an arbitrary and unsupported judgment that the Petitioner required detention and psychological and/or pharmacological evaluation; that based on communications with the Respondent Bank, two (2) police officers were dispatched to the Bank along with an ambulance and crew--to transport the Petitioner to the psychological ward for the psychological and/or pharmacological evaluations requested by the Respondent Bank.

In Adickes, the store manager for the H. S. Kress Company attempted to put a favorable spin on events by acknowledging that he signaled an employee that Ms. Adickes was not to be served. He insisted, however, that his decision had nothing to do with any conspiracy to discriminate against Adickes, but was an attempt to prevent a riot by other patrons who may have become incensed by sight of a White woman being served while in the company of Blacks.

As in the instant case, the district court dismissed Adickes's claim that Kress acted in combination with the Hattiesburg police under color of law, insisting that she had **alleged no facts from which a conspiracy might be inferred**. Similarly too, the appellate court affirmed that judgment. However, the U.S. Supreme Court didn't buy the Kress argument that its employees were acting as good stewards of interracial relations.

Neither should this Court buy the Respondent Bank's explanation that it was acting as the champion of Petitioner's mental, moral or physical health.

The Court, pursuant to FRE, Rule 201(d) is asked to take judicial notice that while, after almost two (2) years, there has been no discovery in this case, there is and can be nothing in the record remotely supportive of the Respondent Bank's unqualified diagnosis. The Respondent Bank knew, rather, that Petitioner's bank card was valid for tens of thousands of dollars. However, while the card was being processed again, the Petitioner retrieved a bag from his car that contained other

valid cards. Almost certainly this was no reasoned basis for the Bank's arbitrary conclusion.[2]

Although the proof in Adickes was wholly circumstantial, the U.S. Supreme Court held that, on the mere possibility that a policeman was present, **it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding**. (My emphasis).

It is an absolute certainty in the instant case that the Respondent Bank and the Knoxville police **communicated** and that they reached a "meeting of the minds" that the Appellant be detained and subjected to psychological and substance evaluation--**an agreement utterly void of legal authority**.

It is, moreover, judicially admitted in the case sub judice that the Respondent Bank never filed a formal "complaint." It is further judicially admitted that the Petitioner was never "arrested." If the Petitioner was not lawfully arrested, then he was **unlawfully kidnapped** for some seven (7) days. Clearly, the informal resolution sought by the Bank was illegal.

It was, therefore, an abrogation and abandonment of well-settled principles and precedents and an abuse of **unpublished cases** for the judicial panel of the Sixth Circuit to hold the Petitioner to a more stringent standard of proof that the

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[2] Petitioner's denial of contracted services was subsequent charged to computer malfunctions, but it seems more likely that there were irregularities in the Bank that day that a substantial withdrawal might have exposed or exasperated.

Respondent Bank, a private party, acted under color of law, than that required in other federal cases. Adickes, supra; Chapman v. Higbee Co., 319 F. 3d 825 (6th Cir. 2003); Collins v. Womancare, 878 F.2d 1145 (9th Cir. 1989); Flint v. Kentucky Dept. of Corr., 270 F.3d 348 6th Cir. 2001); Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Romanski v. Detroit Entertainment, LLC, F3d. (No. 04-1354 6th Cir. 2005); 42 U.S.C. § 1983; Amends. 4, 5 and 14, U.S. Const.; Article I, § 8, Tenn. Const.

II. CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE ARBITRARILY DETERMINED THAT, DESPITE THE RESPONDENT BANK'S PRECISE URGINGS THAT POLICE UNLAWFULLY DETAIN AND SUBJECT THE PETITIONER TO UNWANTED PSYCHOLOGICAL AND/OR PHARMACOLOGICAL EVALUATION, THE RESULTING FORCED DETENTION AND EVALUATIONS DID NOT CAST THE RESPONDENT BANK'S ACTIONS UNDER COLOR OF LAW

As the U.S. Sixth Circuit Court aptly noted in the case of United States v. Anderson, 352 F.2d 500 (6th Cir. 1965), "...conspiracy is provable upon clear inferences which can be derived from a collocation of circumstances and events."

Owing precisely to the urgings of the Bank, the Petitioner was subjected to seven (7) days of detention and experimentation in a mental institution. Therefore, both the actus reus and the mens rea of conspiracy are readily apparent

in the Respondent Bank's persistent urgings that state authorities commit the illegal acts of detaining and subjecting the Petitioner to chemical and/or psychological evaluations against his expressed will and without resort to due process.

As previously noted in Adickes, supra, the facts creating a nexus between the private party (S. H. Kress & Company) and the Hattiesburg Police were almost nonexistent. Nevertheless, the U.S. Supreme Court determined, solely on circumstantial evidence, that the indicia was sufficient for a jury to determine that S. H. Kress employees conspired with local police to deny service to Ms. Adickes and/or to subject her to unlawful arrest once she left the store.

In the instant case it is well established that (1) there were both telephonic and parol communications between the Respondent Bank and the City of Knoxville Police; that (2) the Bank urged that this Petitioner be detained and subjected to psychological and/or substance-abuse evaluation; that (3) for the precise purpose of transporting the Petitioner to a mental institution, an ambulance and crew along with two (2) police officers were dispatched to the site of the Bank; that (4) several additional police officers were dispatched to the Defendant University of Tennessee Medical Center's Psychological Division; that (5) once the Petitioner, protesting against detention, proved that his canvas bag contained no threat, the Bank continued to urge and voice agreement with the two (2) policemen that the Petitioner be detained and evaluated.

Again, the Court is directed to Adickes, supra and its holding that **the mere involvement of police, whether or not his (police's) actions were lawful or authorized, in the alleged conspiracy, would provide the state action needed**

to show a direct violation of petitioner's Fourteenth Amendment rights ....

Without a warrant, without an order from a magistrate or judge, without a wink or a nod towards due process, the Respondent Bank and its co-Defendants conspired to strip the Petitioner of his dignity and liberty and place him in a mental institution.

In invoking the precise **state action** taken by the police and other Defendants, the Respondent Bank acted in concert with the police under **color of law**, and neither the Respondent Bank nor police authorities can avoid Section 1983 sanctions when they "can show no authority" for their actions. Lugar, supra.

The judicial panel for the Sixth Circuit Court and the U.S. District Court below were under self-professed obligation to accept as true the foregoing facts and all clear inferences derived therefrom and to construe them liberally in favor of this Appellant. Miller v. Currie, 50 F.3d 373 (6th Cir. 1995); United States v. Anderson supra;

The panel of the U.S. Sixth Circuit Court of Appeals and the U.S. District Court below committed plain error in failing to accept as true all factual averments and to construe clear inferences in Petitioner's favor. Lugar; Miller; U.S. v. Anderson, supra; 42 U.S.C. § 1983; Amends. 4, 5 and 14, U.S. Const.; Article I, § 8, Tenn. Const.

CONCLUSION

WHEREFORE, in light of the glaring departures from well-established state-action jurisprudence, certiorari is necessary to reassert this Court's sovereignty, to ensure uniformity among the Federal circuits and to curb the abuses apparent in this not-recommended-for-full-text-publication Opinion, and the Petitioner prays the U.S. Supreme Court for all just relief.

Respectfully submitted,

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